93-683

No. 93 —— -

SUPREME COURT, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SECURITY SERVICES, INC. f/k/a
RISS INTERNATIONAL CORPORATION,
Petitioner,

v.

GARVEY CORPORATION

and

INDIA TEXIMPOR, INC.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR WRIT OF CERTIORARI

JOSEPH L. STEINFELD, JR.*
ROBERT B. WALKER
JOHN T. SIEGLER
SIMS, WALKER & STEINFELD, P.C.
1275 K Street, N.W., Suite 775
Washington, D.C. 20005
(202) 842-1741
Counsel for Petitioner

* Counsel of Record

October 29, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

In an action by a motor common carrier to collect its tariff charges may the Interstate Commerce Commission (hereinafter "ICC") declare the carrier's filed distance rate tariff retroactively void solely because the carrier failed to comply with ICC regulations for the determination of distances?

LIST OF PARTIES

Petitioner, Security Services, Inc. f/k/a Riss International Corporation (hereinafter "Security") is a Delaware corporation previously engaged in common carrier transportation of freight in interstate commerce. Respondent, Garvey Corporation (hereinafter "Garvey"), is a New Jersey corporation engaged in the design and manufacture of conveyors. Respondent, India Teximpor, Inc. (hereinafter "Teximpor"), is a New Jersey corporation engaged in garment import.

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* There are no parent or subsidiary companies to be listed for the corporations named in this list of parties.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit and the denial of the petition for rehearing are unreported and reprinted at Appendices D and C. The order and decision of the United States District Court for the District of New Jersey (Debevoise, J.) granting summary judgment for Teximpor, is unreported and is reprinted at Appendix A, and the order of the United States District Court for the District of New Jersey (Simandle, J.) granting summary judgment for Garvey is unreported and is reprinted at Appendix B.

JURISDICTIONAL BASIS

The judgment of the United States Court of Appeals for the Third Circuit was dated, filed and entered on June 14, 1993. Security's petition for rehearing was denied on August 2, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The petition herein was timely filed pursuant to 28 U.S.C. § 2101(c). Security, pursuant to Supreme Court Rule 12.2, has filed this petition for two separate cases together because they contain the identical issue from the same circuit.

STATUTES INVOLVED

49 U.S.C. § 10761. Transportation prohibited without tariff.

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff.

49 U.S.C. § 10762. General tariff requirements.

* * * *

> (e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

STATEMENT OF THE CASE

Petitioner Security Services, Inc. (hereinafter "Security") was a motor common carrier operating pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission (hereinafter "ICC" or "Commission"). Security operated under Title

49 of the United States Code which governs transportation in interstate commerce.

Pursuant to 49 U.S.C. § 10762(a) Security published a tariff containing rates, *inter alia,* stated in cents per mile and filed with the ICC. The filed tariff specified that a distance guide published by Household Goods Carriers Tariff Bureau and filed with the ICC was to be utilized for a determination of distances. Security failed to follow ICC regulations set forth at 49 C.F.R. § 1312.4(d) requiring it to provide the publisher of the distance guide with a current power of attorney at the time of the shipments at issue in these two cases. Security brought separate civil actions against Garvey Corporation ("Garvey"), No. 91-04789, and India Teximpor, Inc. ("Teximpor"), No. 92-01042, in the United States District Court for the District of New Jersey, to collect freight charges based upon this filed tariff.

On September 29, 1992, the United States District Court for the District of New Jersey entered summary judgment in favor of Teximpor against Security. On October 23, 1992, the United States District Court for the District of New Jersey entered summary judgment in favor of Garvey and against Security. A timely appeal was filed by Security in each case at the United States Court of Appeals for the Third Circuit. The cases were consolidated by the Third Circuit on April 16, 1993. On June 23, 1993 the Third Circuit Court of Appeals affirmed the district court findings for both cases and cited *Security Services, Inc. v. K-Mart Corp.*, No. 92-1833 (3d Cir. June 18, 1993), decided five days earlier, as the compelling Circuit precedent for the affirmance. On July 7, 1993, Security filed a timely petition for rehearing. On August 2, 1993, the petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

THIS COURT'S GRANT OF CERTIORARI IN *K-MART*, THE DECISION RELIED ON HEREIN, REQUIRES THAT THIS PETITION BE GRANTED.

On October 18, 1993, this Court granted the petition for writ of certiorari of Security in *Security Services, Inc. v. K-Mart Corp.*, 996 F.2d 1516 (3d Cir. 1993), *cert. granted*, 62 U.S.L.W. 3287 (Oct. 18, 1993). As previously stated, the Third Circuit Court of Appeals opinion in this matter affirmed the district court decisions and advised the parties to see the Circuit's recent *K-Mart* decision. Security requests that this Court grant its petition, as the decision in *K-Mart* will be controlling precedent. Additionally, Security requests that this Court hold the briefing schedule in abeyance pending this Court's *K-Mart* decision and upon issuance of said opinion remand to the Third Circuit for findings consistent with that decision.

CONCLUSION

For the foregoing reasons, the Petition of Security should be granted and a Writ of Certiorari issued to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

JOSEPH L. STEINFELD, JR.*
ROBERT B. WALKER
JOHN T. SIEGLER
SIMS, WALKER & STEINFELD, P.C.
1275 K Street, N.W., Suite 775
Washington, D.C. 20005
(202) 842-1741
Counsel for Petitioner

* Counsel of Record

October 29, 1993

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Doc. No. 92-1042

SECURITY SERVICES, INC., f/k/a
RISS INTERNATIONAL CORP.,
Plaintiff,

vs.

INDIA TEXIMPOR, INC.,
Defendant.

OPINION

[Filed Sept. 30, 1992]

DEBEVOISE, *District Judge*

Defendant, India Teximpor, Inc. (hereinafter "Teximpor") moves to dismiss plaintiff's, Security Services, Inc. f/k/a Riss International Corporation (hereinafter "Riss"), complaint on collateral estoppel grounds and, in the alternative, for summary judgment in its favor under Fed. R. Civ. P. 56. In this action, Riss seeks to collect from Teximpor a freight charge in the sum of $5,820.34 pursuant to 49 U.S.C. §§ 10741, 10761, and 10762.[1]

---

[1] During the hearings for this motion, defendant stated that he was under the impression that he had moved in the alternative for a referral to the Interstate Commerce Commission ("ICC") on the rate reasonableness issue. Although defendant's rebuttal brief makes this request, defendant's notice of motion for summary judgment does not. Since defendant's motion for summary judgment is granted, the court finds it unnecessary to decide whether a referral is warranted.

This Court has original jurisdiction in this case because the claims arise under an Act of Congress regulating commerce. See 49 U.S.C. §§ 10741, 10761, 10762; 28 U.S.C. § 1337.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

The facts are straightforward and uncontroverted. Riss is incorporated in the State of Delaware and is a motor common carrier licensed by the Interstate Commerce Commission (hereinafter "ICC") to engage in the for-hire transportation of freight. Between April and August of 1989, Teximpor hired Riss to transport freight interstate. Riss billed Teximpor a total of $3,610.80 for its services.

Some time after August 1990, Riss' auditor, Trans-Allied Audit Company, Inc., re-calculated Riss' bill to Teximpor based on the tariff rates Riss had on file with the ICC at the time Riss transported freight for Teximpor. The auditor determined that Riss had "undercharged" Teximpor by $5,820.34.

The tariff which Riss had on file with the ICC and on the basis of which it sought increased charges from Teximpor was entitled "ICC Riss 501-B." The "ICC Riss 501-B" tariff was dependant on mileage. To compute the mileage, the "ICC Riss 501-B" referred to the Household Goods Carrier Bureau, Agent ("HGCB") Mileage Guide No. 12, ICC HCB 100-A. Riss did not file a power-of-attorney or concurrence with the HGCB to "participate" in the HGCB's mileage guide, but after February 19, 1985 the participation terminated by reason of non-payment of fees.

Riss brought this instant action against Teximpor to recover the $5,820.34 balance, pre-judgment interest, post-judgment interest and costs.[2] Teximpor, citing two previ-

[2] Plaintiff and defendant agree that there is no issue of contract carriage to be considered; therefore, the only type of charges analyzed in this opinion are carrier charges.

ous cases decided against Riss, moves to dismiss Riss' cause of action based on the doctrine of collateral estoppel. Prior to this action, Riss lost two separate undercharge actions similar to this one against two different defendants. If a dismissal of this action is denied, Teximpor seeks to have summary judgment entered against plaintiff.

For the reasons set forth below, defendant's motion to dismiss based on the collateral estoppel doctrine is denied and defendant's motion for summary judgment is granted.

DISCUSSION

A. *Background*

Pursuant to the Interstate Commerce Act, a carrier licensed by the ICC may provide "transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect . . . ." *See* 49 U.S.C. § 10761(a). For a tariff to be in effect, it must be published and filed with the ICC. 49 U.S.C. § 10762. The ICC has promulgated a series of regulations which detail the requirements for filing and publishing tariffs. 49 C.F.R. § 1312 *et seq.*

49 C.F.R. § 1312.1(b)(35) defines a "tariff" as "a publication containing rates, classification ratings, rules, regulations, or other provisions as amended, filed in a carrier's or an agent's name." A mileage rate consists of two parts: the rate per mile and the distance between the origin and destination to be multiplied by the rate per mile. *See Jasper Wyman & Son, et al.*, 8 I.C.C.2d 246, 248 (Jan. 30, 1992) (citing 49 C.F.R. § 1312.30). 49 C.F.R. § 1312.30 provides carriers three methods of determining distances for calculating mileage rates.

> "(c) *Determination of distances* . . .
>
> (i) publishing the distances between all locations covered by the distance rates in the tariff;

(ii) Referring to a map(s) attached to the tariff; or

(iii) Referring to a distance guide(s)."

Carriers participating in tariffs which refer to, and are governed by, separate tariffs must participate in each of the separate tariffs, unless the governing tariff specifically states otherwise. 49 C.F.R. § 1312.27(e). A carrier participates in a tariff filed by another carrier or an agent by issuing a concurrence or power-of-attorney. 49 C.F.R. §§ 1312.10(b), 1312.4(d). Unless a power-of-attorney or concurrence has been executed, a carrier may not participate in a tariff issued in the name of another carrier. 49 C.F.R. § 1312.4(d). If a carrier does so, the regulation expressly provides that "the tariffs are void as a matter of law." *Id.*

B. *Motion To Dismiss Based on Collateral Estoppel*

Relying on the doctrine of collateral estoppel, defendant moves for plaintiff's action to be dismissed. The case which held against plaintiff on claims asserting the same grounds as those upon which plaintiff relies in this case is *Jasper Wyman & Son,* 8 I.C.C.2d 246 (Jan. 30, 1992). Subsequent court cases which decided against plaintiff relied to a greater or lesser extent upon *Jasper Wyman,* since deference is accorded to interpretation of statutes and regulations given by the agency responsible for administering the statutes and regulations. However, *Jasper Wyman* is on appeal, and until the appeal is resolved the issues are not fully litigated and the decision should not yet be given binding effect upon plaintiff. Therefore, plaintiff's motion to dismiss based on collateral estoppel grounds is denied.

C. *Summary Judgment*

Summary judgment is appropriate where the moving party establishes that "there is no genuine issue of material

fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. *Celotex. Corp. v. Catrett*, 477 U.S. 317 (1986).

Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts in question. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *rev'g*, 723 F.2d 238 (3d Cir. 1983). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. *Sound Ship Building Co. v. Bethlehem Steel Co.*, 533 F. 2d 96, 99 (3d Cir. 1976), *cert. denied*, 429 U.S. 860 (1976).

The Supreme Court has explained that in evaluating the evidence presented, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Wahl v. Rexnord*, 624 F.2d 1169, 1181 (3d Cir. 1980). When ruling on a motion for summary judgment the court must also consider the relevant burdens of proof at trial. *Celotex Corp. Catrett*, 477 U.S. 317, 322-24. *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

All the circumstances surrounding this case, as pleaded and supported by opposing affidavits, create no genuine issue of material fact foreclosing summary judgment. The dispute involves a question of law, i.e., a construction of the legal effect to be given to regulations of the ICC and is, consequently ripe for summary judgment.

Plaintiff asserts that the defendant was billed for transport services at a rate lower than the rate plaintiff filed with the ICC. The plaintiff relies upon the "filed rate

doctrine" which makes the shipper liable for the difference between the rate filed with the ICC and the rate the carrier originally billed. *Maislin Indus. U.S., Inc. v. Primary Steel Corp.*, 110 S.Ct. 2759, 2761 (1990); *Horn's Motor Express, Inc. v. Harrisburg Paper Co.*, 765 F. Supp. 211, 213 (M.D. Pa. 1991); *A-Line, Ltd. v. General Chemical Corp.*, Civ. Act. No. 91-0532, 1992 WL 68335 (E.D. Pa. March 31, 1992). For the filed rate doctrine to apply, the rate filed must be effective.

In support of Teximpor's motion for summary judgment, defendant asserts that the rate filed by Riss with the ICC on which Riss relies is void as a matter of law and that Riss cannot recover the difference between the sums billed in the initial and subsequent invoices. The issue presented in this case is whether under 49 C.F.R. § 1312.4 (d), Riss, the carrier, may refer to the mileage rate published by HGCB when Riss is not a participant of HGCB by having on file a currently effective concurrence or power-of-attorney.

The ICC has squarely addressed this issue on all fours. In *Jasper Wyman & Son, et al.*, 8 I.C.C.2d 246 (Jan. 30, 1992), the carrier's claim was held void as a matter of law under 49 C.F.R. § 1312 *et seq.* because the carrier cancelled its participation in a published mileage guide and did not have an effective power-of-attorney or concurrence with the issuing board. *Id.* at 246.

The carrier unsuccessfully argued that the tariff voiding provisions of Section 1312.4(d) did not apply to mileage guides because they are not considered tariffs. *Id.* at 249. The Commission rejected this argument, explaining that the regulations require distance guides to be filed, hence, distance guides are tariffs. *Id.* at 251 (citing 49 C.F.R. § 1312.30(c)(4)).

The Commission concluded that the mileage rate tariff the carrier relied upon could "not form the basis for the undercharges sought." *Id.* at 247. The Commission rea-

soned that because the carrier had no method to compute mileage, the carrier's tariff was incomplete. *Id.* at 247-48.

Federal courts have followed the *Jasper Wyman* holding and entered summary judgment against the carrier. *See, e.g., Freightcor Servs., Inc. v. Vitro Packaging, Inc.*, Civ. No. 91-1507 at 22-23 (5th Cir. June 26, 1992) (directed district court to enter summary judgment against carrier); *Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.*, Civ. No. 4-90-254, 1992 WL 195426 (D. Minn. March 6, 1992); *Security Services, Inc. v. All Freight Services, Inc.*, Case No. LA 91-1502-K (S.D. Ca. May 4, 1992); *F.P Corp. v. Golden West Foods, Inc.*, Civ. No 91-0040-L at 7 (W.D. Va. July 28, 1992); *Security Servs., Inc. v. Friedrich Air Conditioning and Refrigeration*, Civ. Act. H-91-3227 (S.D. Tx. May 15, 1992). *But see Freightcor Servs. v. Bowater Communications Papers*, Civ. No 3-9-1870-C (N.D.Tx July 25, 1991) (Cumminos, J.). Courts have reasoned that deference should be given to the ICC's interpretation of the regulation in *Jasper Wyman* because it is reasonable. *See, e.g., F.P Corp. v. Golden West Foods, Inc.*, Civ. No 91-0040-L at 5 (W.D. Va. July 28, 1992); *Services, Inc. v. All Freight Services, Inc.*, Case No. LA 91-1502-K at 9-10; *Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.*, Civ. No. 4-90-254, 1992 WL 195426 at *3. Notwithstanding the *Jasper Wyman* decision, courts that have analyzed the relevant regulations for themselves have arrived at the same conclusion as the ICC. *See, e.g., Freightcor Servs., Inc. v. Vitro Packaging, Inc.*, Civ. No. 91-1507; *Security Services, Inc. v. All Freight Services, Inc.*, Case No. LA 911502k; *F.P Corp. v. Golden West Foods, Inc.*, Civ. No 91-0040-L.

In two cases where Riss brought undercharge actions similar to the one here, summary judgment was entered against Riss. In *Security Servs., Inc. v. Friedrich Air Conditioning and Refrigeration*, Civ. Act. H-91-3227 (S.D. Tx. May 15, 1992), the court expressly held that "ICC

Riss 501-B tariff is void because it relies, through reference, upon the Household Goods Carrier's (sic) Bureau Mileage Guide Tariff 100-B, when [Riss] did not participate when the two shipments forming the basis of the complaint moved." Similarly in *Security Services, Inc. v. All Freight Services, Inc.,* Case No. LA 911502k (S.C. Ca. May 4, 1992), the court held Riss' failure to participate in the Household Goods Mileage Guides voided, as a matter of law, the tariffs Riss relied upon in bringing the action for the undercharge.

The only court opinion provided by plaintiff holding to the contrary is an opinion which pre-dates the *Jasper Wyman* opinion and fails to spesify a detailed basis for the decision. *See Freightcor Servs. v. Bowater Communications Papers,* Civ. No. 3-9-1870-C (N.D.Tx July 25, 1991) (Cumminos, J.). In a two page opinion, the court succinctly concluded that " 'referring' to a distance guide, without more, does not constitute 'participating' in a tariff within the meaning of 49 C.F.R. 1312.4(d)." *Id.*

It is uncontested that Riss referred to another entity's distance guide pursuant to 49 C.F.R. § 1312.30(c)(iii) in establishing its filed tariff. The tariff Riss filed with the ICC, "ICC Riss 501-B", expressly refers to the HGCB's mileage guide. ICC HGB 100 Series. *See* Exhibit C within Def. Br. Exhibit A. Riss ceased being a participant in the HGCB Mileage Guide after February 19, 1985. *See* Exhibit A within Exhibit A of Def. Br. Therefore, between April and August of 1989 when Teximpor transported freight on Riss' behalf, Riss was not a participant in the HGCB Mileage Guide. Applying the rulings of *Jasper Wyman* and the federal cases cited above to these facts, Riss is prohibited from relying on the "ICC Riss 501-B" tariff to recover the balance of the undercharge it seeks from Teximpor.

Specifically, Riss' failure to participate in the Household Goods Mileage Guides voided, as a matter of law, "ICC Riss 501-B."

Plaintiff nonetheless argues that the ICC cannot use 49 C.F.R. § 1312.4(d) to retroactively reject effective tariffs. To support its argument, plaintiff cites *Interstate Commerce Commission v. American Trucking Association, Inc.*, 467 U.S. 354 (1984), where the Supreme court held that 49 U.S.C. § 10762, which authorizes the ICC to reject motor carrier tariffs if they violate statutory or regulatory requirements for publishing or filing taiffs, does not confer upon the ICC the broad power to nullify effective tariffs retroactively. Plaintiff's argument is not persuasive. 49 C.F.R. § 1312.4(d) is not being interpreted here to retroactively reject an effective tariff. Rather, the conclusion of this court is that the tariff was not effective after February 19, 1985 for the purposes of charging defendant. *See F.P. Corp. v. Golden West Foods, Ind.*, Civ. No. 91-0040-L at 6-7 (W.D. Va. July 28, 1992) (the court found *American Trucking* inapplicable for determining the tariff issues involved because the carrier's rate tariff was never effective); *Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.*, Civ. No. 4-90-254, 1992 WL 195426 *4; *see also Freightcor Servs., Inc. v. Vitro Packaging, Inc.*, Civ. No. 91-1507, slip op., at 17 (5th Cir. Aug. 14, 1992) (Firth Circuit found *Jasper Wyman* consistent with *American Trucking* and that § 1312.4(d) "defines when a tariff became effective or becomes void through the action or inaction of a carrier").

Since the invalidity of the tariff is dispositive, the issue concerning whether the recalculated charges are reasonable will not be reached.

For the reasons provided above, defendant's summary judgment motion is granted.

/s/ Dickinson R. Debevoise
DICKINSON R. DEBEVOISE
U.S.D.J.

Dated: Sept. 30, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Doc. No. 92-1042

SECURITY SERVICES, INC., f/k/a
RISS INTERNATIONAL CORP.,
Plaintiff,

vs.

INDIA TEXIMPOR, INC.,
Defendant.

ORDER

[Filed Sept. 30, 1992]

This matter having been opened to the court on the motion of the defendant, India Teximpor, Inc., for an order to dismiss plaintiff's action based on the collateral estoppel doctrine and, in the alternative, granting summary judgment pursuant to Fed. R. Civ. P. 56. in the above-captioned matter; and the court, having considered the submissions of the parties, and for the reasons set forth in an opinion of even date and for good cause shown;

IT IS this 30th day of September, 1992 ORDERED as follows:

1. Plaintiff's motion to dismiss is denied;

2. Plaintiff's motion for summary judgment is granted; and

3. Judgment is entered in favor of defendant and against plaintiff with costs of suit allowed.

/s/ Dickinson R. Debevoise
DICKINSON R. DEBEVOISE
U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Doc. No. 92-1042

SECURITY SERVICES, INC., f/k/a
RISS INTERNATIONAL CORP.,
Plaintiff,

vs.

INDIA TEXIMPOR, INC.,
Defendant.

ORDER

[Filed Oct. 2, 1992]

It is this 1st day of October, 1992 ORDERED as follows:

The order filed September 30, 1992 is hereby amended as follows:

In the numbered paragraphs 1 & 2 the word "Plaintiff's" is changed to "Defendant's."

/s/ Dickinson R. Debevoise
DICKINSON R. DEBEVOISE
U.S.D.J.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 91-4789(JBS)

SECURITY SERVICES, F/K/A
RISS INTERNATIONAL CORPORATION,
Plaintiff,

v.

GARVEY CORPORATION,
Defendant.

ORDER

[Filed Oct. 23, 1992]

There being three motions presently pending before the court in the above-captioned case: (1) plaintiff Security Services, Inc. f/k/a Riss International Corp.'s ("Security Services") motion to dismiss defendant's counterclaims; (2) defendant Garvey Corp.'s motion for summary judgment; and (3) plaintiff's cross-motion for summary judgment; and the court having carefully reviewed the parties submissions without oral argument pursuant to Rule 78, Fed.R.Civ.P.; and having considered the appropriate summary judgment standard as laid down by the Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); and the parties' submissions revealing that there are no genuine issues of material fact that need to be resolved; and that the only question for resolution is solely a question of law; and

that question being whether plaintiff's failure to participate in the Household Goods Carriers' Bureau (HGCB) Mileage Guide renders void, as a matter of law, the tariff provision upon which the plaintiff relies for recovery; the court hereby finds that

Plaintiff's failure to participate formally with the HGCB, after referring to it in its own tariff, rendered void its own tariff as a matter of law, under Interstate Commerce Commission regulation 49 C.F.R. § 1312.4(d). In so finding, this court adopts the reasoning applied by the United States Court of Appeals for the Fifth Circuit in *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563 (5th Cir. 1992), and by the Interstate Commerce Commission in *Petition of Jasper Wyman & Son, et al. re: Overland Express, Inc.*, ICC Case No. 40150, 8 I.C.C.2d 246 (1992), whose analysis and conclusions the Fifth Circuit extensively referred to in *Freightcor*. This court also acknowledges and notes its agreement with the conclusions of the several cases explicitly dealing with the precise issue presented here which defendant has called to our attention through various Memoranda of Supplemental Authorities. Every one of the courts whose decisions were called to our attention reached the same result as did the Fifth Circuit in *Freightcor*. Among those cases are several which involved the instant plaintiff, Security Services, including *Security Services, Inc. v. Cramer Products, Inc.*, No. 91-0966-CV-W-2 (W.D.Mo. July 14, 1992). Many of the arguments plaintiff makes here as to why this court should not find that the tariff upon which it relies is void as a matter of law, particularly plaintiff's reliance upon *Interstate Commerce Commission v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984), were addressed and rejected by the court in *Freightcor*. We too find plaintiff's reliance on *ICC v. ATA* unavailing.

FURTHERMORE, the court also having considered the appropriate standard for reviewing motions to dismiss as articulated by the Supreme Court in *Conley v. Gibson*,

355 U.S. 41, 45-46 (1957), *i.e.*, that a court may not dismiss a complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief;" the court hereby find that

Defendant's counterclaims for negligence and breach of contract are clearly barred by Title 49 U.S.C. § 10761(a) and the accompanying "filed rate doctrine" articulated by the Supreme Court in *Louisville & Nashville R.R. Co. v. Maxwell,* 237 U.S. 94, 97 (1915), and *Keogh v. Chicago & Northwestern Ry. Co.,* 260 U.S. 156, 163 (1922), and recently reaffirmed by it in *Maislin Industries, U.S., Inc. v. Primary Steel,* 497 U.S. 116 (1990); and that they are in any event rendered moot by this court's decision to grant summary judgment for the defendant to the extent that defendant asks for damages "in an amount equal to the difference between the agreed and negotiated rates and the rates alleged by plaintiff to be the applicable filed rates;" and that to the extent the counterclaims ask for attorney's fees under 49 U.S.C. § 11705(d)(3) and for other damages under § 11705(b), they otherwise fail in their entirety because plaintiff has not been "found liable under . . . subsection" 11705(d), and because § 11705(b) clearly does not entitle defendant to the damages it seeks under the circumstances of this case.

Therefore, for the reasons stated above, and for good cause shown;

It is on this 23rd day of October, 1992,

ORDERED that Defendant's Motion for Summary Judgment on Plaintiff's Complaint shall be and hereby is *GRANTED*; and it is further

ORDERED that Plaintiff's Cross-Motion for Summary Judgment shall be and hereby is *DENIED*; and it is further

ORDERED that Plaintiff's Motion to Dismiss Defendant's Counterclaims shall be and hereby is *GRANTED*.

/s/ Jerome B. Simandle
JEROME B. SIMANDLE
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-5596 & 92-5629

SECURITY SERVICES, INC., f/k/a
RISS INTERNATIONAL CORPORATION,
Appellant in 92-5596 & 92-5629

v.

INDIA TEXIMPOR, INC.,
Appellee in 92-5596

GARVEY CORPORATION,
Appellee in 92-5629

Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 92-01042
(Honorable Dickinson R. Debevoise)
D.C. Civil Action No. 91-04789
(Honorable Jerome B. Simandle)

Submitted June 14, 1993

Before: SCIRICA, COWEN and WEIS, *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED. *See Security Services v. K-Mart Corp.*, No. 92-1833 (3d Cir. June 18, 1993).

Costs taxed against appellant.

BY THE COURT,

/s/ A. J. Scirica
Circuit Judge

Attest:

/s/ P. Douglas Sisk
P. DOUGLAS SISK
Clerk

[Jun. 23, 1993]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-5596 & 92-5629

SECURITY SERVICES, INC., f/k/a
RISS INTERNATIONAL CORPORATION,
Appellant in 92-5596 & 92-5629

v.

INDIA TEXIMPOR, INC.,
Appellee in 92-5596

GARVEY CORPORATION,
Appellee in 92-5629

(D.C. Civ. Nos. 92-01042 & 91-04789)

SUR PETITION FOR PANEL REHEARING

Present: SCIRICA, COWEN and WEIS, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for rehearing, and none of the members of the panel having voted for rehearing, the petition for rehearing is denied.

BY THE COURT,

/s/ A. J. Scirica
Circuit Judge

Dated: August 2, 1993

Supreme Court, U.S.
FILED
FEB 3 1994
OFFICE OF THE CLERK

No. 93-683

In The

Supreme Court of the United States

October Term, 1993

SECURITY SERVICES, INC., f/k/a
RISS INTERNATIONAL CORPORATION,

Petitioner,

v.

GARVEY CORPORATION
and
INDIA TEXIMPOR, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. AUGELLO*
MARIANNE ROWDEN
AUGELLO, PEZOLD & HIRSCHMANN
24 Woodbine Avenue,
Suite 8
Northport, New York
11768
(516) 261-0100

GERARD F. SMITH
220 Kinderkamack Road
Westwood, New Jersey
07675
(201) 666-2002

February 3, 1994

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Where a carrier's participation in the Household Goods Carriers' Bureau Mileage Guide Tariff was cancelled, is the carrier's continued use of that tariff a violation of the filed rate doctrine?

No. 93-683

In The

Supreme Court of the United States

October Term, 1993

SECURITY SERVICES, INC., f/k/a
RISS INTERNATIONAL CORPORATION,

Petitioner,

v.

GARVEY CORPORATION
and
INDIA TEXIMPOR, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, the denial of the petition for rehearing, and the decision of the United States District Court for the District of New Jersey all appear as Appendices in the Petition for Certiorari.

STATEMENT OF THE CASE

This case involves undercharge actions filed by Security Services, Inc. (hereinafter "Security" or "Riss") against Garvey Corporation and India Teximpor, Inc. Both Respondents filed motions for summary judgment with the District Court for the District of New Jersey. The District Court held that the tariffs upon which the Trustee based his undercharge claims referred to the Household Goods Carriers' Bureau ("HGB") Mileage Guide Tariff for distances. However, since Riss did not execute a power of attorney to participate in the HGB, the District Court held that Riss' tariff was void as a matter of law relying on *Jasper Wyman & Son, et al. – Petition for Declaratory Order – Certain Rates and Practices of Overland Express, Inc.*, No. 40510, 8 I.C.C.2d 246 (1992) and *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, No. 91-1507 (5th Cir. June 26, 1992), *withdrawn and op. replaced on reh'g*, 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (1993). The District Court entered judgment on September 30, 1992 and October 23, 1992 for Respondents, respectively. The Trustee filed notices of appeal and the Third Circuit Court of Appeals consolidated the two cases upon its own motion on April 16, 1992. The Third Circuit affirmed the District Court based on its earlier opinion in *Security Services, Inc. v. K Mart Corporation*, No. 92-1833, subsequently reported at 996 F.2d 1516 (3rd Cir. 1993). The Third Circuit entered judgment on June 23, 1993, and subsequently denied rehearing on August 2, 1993.

REASONS FOR GRANTING THE WRIT

The Issue Herein Is Identical To The Issue In *K MART*

This Court's recent acceptance of *Security Services, Inc. v. K Mart* presents the same issue in the case at bar. *Security Services, Inc. v. K Mart*, 996 F.2d 1516 (3rd Cir. 1993), *cert. granted*, 62 U.S.L.W. 3287 (Oct. 18, 1993) (No. 93-284). Respondents agree with Petitioner that this Court should grant *certiorari* in this case, but stay all briefing until the Court issues its opinion in *Security Services, Inc. v. K Mart* scheduled for oral argument on February 28, 1994.

CONCLUSION

For the foregoing reasons, the Petition of Security Services should be granted and a Writ of Certiorari issued to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

WILLIAM J. AUGELLO*
MARIANNE ROWDEN
AUGELLO, PEZOLD & HIRSCHMANN
24 Woodbine Avenue,
Suite 8
Northport, New York
11768
(516) 261-0100

GERARD F. SMITH
220 Kinderkamack Road
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*Counsel of Record